

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

STEFFANIE CHAU,

Appellant,

v.

STATE OF WASHINGTON EMPLOYMENT
SECURITY DEPARTMENT,

Respondent.

No. 33830-1-II

UNPUBLISHED OPINION

HOUGHTON, P.J. -- Steffanie Chau, acting pro se, sued her former employer, the Employment Security Department (ESD), claiming wrongful discharge, employment discrimination, retaliation, fraud, and breach of contract. Chau appeals a trial court order granting ESD's motion for summary judgment. We affirm.

FACTS

Chau worked as a financial analyst in ESD's treasurer's office. She performed accounting duties that included processing cash draws from various grant accounts for payroll use. Her duties included recording those transactions and creating a clear audit trail. When processing a cash draw in the federal system, she recorded the transaction in the State and agency systems so that all ledgers matched.

In April 2001, ESD treasury manager, Lee Rolle, discovered many irregularities in Chau's

cash draws that resulted in inaccurate and unreliable financial records for more than \$12 million. Because of Chau's inappropriate cash handling, ESD violated the federal Cash Management Improvement Act, 31 U.S.C. § 503, and the state auditor issued an audit finding against ESD. It took Rolle more than five months to reverse Chau's transactions.

After an investigation, ESD's deputy commissioner, Paul Trause, determined that Chau "neglected her duty, was incompetent, insubordinate, and had engaged in gross misconduct." 2 Clerk's Papers (CP) at 285. He decided to dismiss Chau based on her employment history and the seriousness of her misconduct.

On April 12, 2002, Trause informed Chau that ESD would terminate her employment on April 29. ESD concluded that Chau "prepared accounting records that did not accurately reflect her cash draw transactions, attempted to conceal incorrect transactions by preparing misleading documents, and failed to comply with process instructions provided by her superiors." CP at 279.

Chau appealed to the Personnel Appeals Board (PAB). The PAB upheld ESD's decision to terminate her employment, concluding that "[i]n light of [Chau's] egregious behavior, [ESD] has established that the disciplinary sanction of dismissal was not too severe and was appropriate." CP at 289.

Chau sought judicial review of the PAB ruling. The superior court affirmed the PAB, finding that the PAB did not act arbitrarily or capriciously and that substantial evidence supported its ruling. Chau did not appeal the superior court's ruling.

Instead, acting pro se, Chau sued ESD, claiming wrongful discharge, employment discrimination, retaliation, fraud, and breach of contract. ESD moved for summary judgment, arguing, *inter alia*, collateral estoppel. The trial court granted ESD's motion and dismissed

Chau's lawsuit with prejudice. Chau appeals.¹

ANALYSIS²

Collateral Estoppel

Chau's arguments pertain to PAB's decision to uphold her termination. Because she already litigated the PAB's decision in a prior action, we must decide whether the collateral estoppel doctrine applies here.

The collateral estoppel doctrine bars relitigation of the same issues in a later proceeding between the same parties. *Christensen v. Grant County Hosp. Dist. 1*, 152 Wn.2d 299, 306, 96 P.3d 957 (2004). It differs from res judicata "in that, instead of preventing a second assertion of the same claim or cause of action, it prevents a second litigation of issues between the parties, even though a different claim or cause of action is asserted." *Christensen*, 152 Wn.2d at 306

¹ On appeal, Chau claims "Wrongful Termination, Retaliation/Harassment Discrimination, Fraud, and Perjury, Breach of contract agreements AND Defamatory." Appellant's Br. at 4.

Chau sets forth neither argument nor authority for her breach of contract claim and, although we could decline to address it, we note that her claim fails because "a civil servant . . . may not raise a contract claim against the State when that suit arises from his employment." *Weber v. Dep't of Corrections*, 78 Wn. App. 607, 611, 898 P.2d 345 (1995); see RAP 10.3(a)(5).

With regard to her defamation claim, Chau merely asserts that ESD's actions were "defamatory to [her] personal integrity and . . . dignity." Appellant's Br. at 28; Appellant's Reply Br. at 7, 17, 21, 27. Chau did not raise this claim below, nor does she set forth argument as required under the RAPs, and we decline to address this claim further. See RAP 2.5(a); RAP 10.3(a)(5).

² The parties agree that Chau failed to properly serve her summons and complaint. RCW 4.92.020 required her to serve the Attorney General's Office, but she mistakenly served ESD instead. The trial court, however, did not rule on this issue, stating, "I'm disregarding the issue of lack of service." Report of Proceedings at 20. As we affirm the trial court on other grounds, we do not address this issue.

(quoting *Rains v. State*, 100 Wn.2d 660, 665, 674 P.2d 165 (1983)) (internal quotation marks omitted). “[C]ollateral estoppel is intended to prevent retrial of one or more of the crucial issues or determinative facts determined in previous litigation.” *Christensen*, 152 Wn.2d at 306 (quoting *Luisi Truck Lines, Inc. v. Wash. Utils. & Transp. Comm’n*, 72 Wn.2d 887, 894, 435 P.2d 654 (1967)).

Washington courts require four elements in applying the collateral estoppel doctrine: “(1) identical issues; (2) a final judgment on the merits; (3) the party against whom the plea is asserted must have been a party to or in privity with a party to the prior adjudication; and (4) application of the doctrine must not work an injustice on the party against whom the doctrine is to be applied.” *Southcenter Joint Venture v. Nat’l Democratic Policy Comm.*, 113 Wn.2d 413, 418, 780 P.2d 1282 (1989) (quoting *Shoemaker v. Bremerton*, 109 Wn.2d 504, 507, 745 P.2d 858 (1987)) (internal quotation marks omitted).

In *Reninger v. Dep’t of Corrections*, our Supreme Court held that the collateral estoppel doctrine applied to a PAB decision, stating that the appellants “were afforded and took advantage of numerous procedures that obtain in superior court trials.” 134 Wn.2d 437, 451, 454, 951 P.2d 782 (1998). In *Christensen*, our Supreme Court also noted:

It is true that choosing an administrative proceeding may ultimately preclude a later tort claim due to an agency’s factual findings. However, this is the essence of collateral estoppel. There is nothing inherently unfair about this result provided the party has the full and fair opportunity to litigate, there is no significant disparity of relief, and all the other requirements of collateral estoppel are satisfied.

152 Wn.2d at 312-13.

Here, collateral estoppel bars Chau from relitigating the PAB’s decision. No one disputes

that the parties are the same and that the PAB entered a final judgment, satisfying elements 2 and 3.

As to element 1, identical issues appear in both actions. Chau simply reasserts the issues that the PAB addressed in its findings of facts and conclusions of law. For instance, regarding Chau's first argument that she did not commit misconduct, the PAB concluded that ESD "met its burden of proving that [Chau's] behavior constituted gross misconduct." CP at 288.

The same identity of issues analysis applies to the remainder of her arguments, which mainly comprise claims that ESD engaged in fraud and perjury in wrongfully discharging her. The PAB reviewed and addressed the identical arguments when it entered its findings of facts and conclusions of law. As the trial court correctly pointed out, they were "really the same issues . . . that were decided before." Report of Proceedings (RP) at 19.

Finally, as to element 4, the application of the doctrine will not cause injustice because Chau not only was represented by counsel during the PAB process and the appeal to the superior court, but also had a full and fair opportunity to litigate her claim before a neutral forum. As stated in *Reninger*, Chau was "entitled to one bite of the apple, and [she] took that bite." 134 Wn.2d at 454. Consequently, the collateral estoppel doctrine forecloses Chau's current action.

Sufficient Evidence

Discrimination

Chau further argues that the collateral estoppel doctrine does not preclude her discrimination and retaliation claims. She asserts that these claims were not litigated before the PAB and that the trial court erred in granting summary judgment based on her failure to meet her burden to avoid summary judgment. Even assuming that Chau's discrimination and retaliation

claims are not collaterally estopped, her arguments nonetheless fail.

In reviewing summary judgment motions “in discrimination cases brought under state and common law, where the plaintiff lacks direct evidence of discriminatory animus,” our Supreme Court adopted the federal protocol announced in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973). *Hill v. BCTI Income Fund-I*, 144 Wn.2d 172, 180, 23 P.3d 440 (2001) (emphasis omitted).

Chapter 49.60 RCW prohibits an employer from discriminating on the basis of, among other things, gender, race, color, or national origin. RCW 49.60.180. To establish a prima facie case of discrimination by disparate treatment, a plaintiff must show that (1) she belongs to a protected class, (2) she was treated less favorably in the terms or conditions of her employment (3) than a similarly situated, nonprotected employee, and (4) she and the nonprotected employee were doing substantially the same work; if the employer then proffers a legitimate, nondiscriminatory reason for its action, then (5) the plaintiff must produce evidence indicating that the employer’s reason is pretextual. *Johnson v. Dep’t of Soc. & Health Servs.*, 80 Wn. App. 212, 226-27, 907 P.2d 1223 (1996).

“The employee shows pretext if the proffered justifications have no basis in fact, are unreasonable grounds upon which to base the termination, or were not motivating factors in employment decisions for other similarly-situated employees.” *Griffith v. Schnitzer Steel Indus., Inc.*, 128 Wn. App. 438, 447, 115 P.3d 1065 (2005), *review denied*, 156 Wn.2d 1027 (2006). An employee need not produce direct evidence to show pretext; circumstantial and inferential evidence can be sufficient. *Griffith*, 128 Wn. App. at 447. But an employee’s speculation or subjective belief on her performance is irrelevant. *Griffith*, 128 Wn. App. at 447.

An employer is entitled to summary judgment “if no rational trier of fact could conclude that discrimination was a substantial factor in the employer’s action.” *Griffith*, 128 Wn. App. at 448. In other words, an employer would be entitled to summary judgment ““if the record *conclusively* revealed some other, nondiscriminatory reason for the employer’s decision, or if the plaintiff created only a weak issue of fact as to whether the employer’s reason was untrue *and* there was *abundant and uncontroverted* independent evidence that no discrimination had occurred.”” *Griffith*, 128 Wn. App. at 448 (quoting *Hill*, 144 Wn.2d at 184-85) (internal quotation marks omitted).

Here, Chau argues that ESD discriminated against her because it discharged only her although others were also responsible for the erroneous cash draws that caused inaccurate records of the \$12 million. She asserts that ESD singled her out because she is an “Asian (female).” Appellant’s Reply Br. at 22.

But even if we assume that Chau met her initial burden of proving a prima facie case of discrimination, she fails to produce evidence indicating that ESD’s reason for discharging her was merely a pretext. Conversely, ESD proffers a nondiscriminatory reason for her discharge.

ESD contends that it terminated her employment because Chau “neglected her duty, was incompetent, insubordinate, and had engaged in gross misconduct.” CP at 285. Before discharging her, Trause reviewed Chau’s assertions that there were other people responsible for the errors but determined that these assertions were not credible. Moreover, PAB concluded that ESD met its burden of proving these nondiscriminatory bases for terminating her employment.

Chau fails to demonstrate that these justifications do not have a basis in fact or were unreasonable grounds for her discharge. Throughout her briefing, she repeats that ESD engaged

in fraud and perjury in wrongfully discharging her. That is, she does not explain why ESD's justifications were pretextual. Further, she fails to offer any evidence that could discredit ESD's justification.

On the other hand, the PAB's findings of fact and conclusions of law conclusively establish that ESD had nondiscriminatory reasons for discharging her. Accordingly, the record in its entirety provides insufficient evidence to create an issue of fact precluding summary judgment. Thus, the trial court properly granted summary judgment.

Retaliation

Chau's retaliation claim fails for similar reasons. She argues that ESD retaliated against her because she "settle[d] with ESD in Dec[.] 1999."³ Appellant's Reply Br. at 16. "An employer may not retaliate against an employee for opposing the employer's discriminatory practices or for filing a discrimination claim against the employer. RCW 49.60.210." *Milligan v. Thompson*, 110 Wn. App. 628, 638, 42 P.3d 418 (2002).

"The burden-shifting scheme is the same as for discrimination claims." *Milligan*, 110 Wn. App. at 638. To establish a prima case of retaliation, a plaintiff must show that (1) she engaged in a statutorily protected activity, (2) the employer took an adverse employment action against her, and (3) there is a causal connection between her activity and the employer's adverse action. *Milligan*, 110 Wn. App. at 638. "[W]hen the employee's evidence of pretext is weak or the employer's nonretaliatory evidence is strong, summary judgment is appropriate." *Milligan*, 110 Wn. App. at 638-39.

Even if we assume that Chau can establish a prima facie case of retaliation, she fails to

³ It is unclear whether this was a lawsuit or an internal dispute.

show that ESD used its justifications as a pretext to cover retaliation. That is, she does not provide any evidence that could link her discharge with her settlement. The record as a whole demonstrates that ESD terminated her employment due to her activities surrounding her cash draw errors, not because of her settlement. Consequently, no issue of material fact precludes summary judgment and the trial court did not err in granting ESD's motion.

Affirmed.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record pursuant to RCW 2.06.040, it is so ordered.

Houghton, P.J.

We concur:

Bridgewater, J.

Penoyar, J.